"PRICE-SQUEEZE" CLAIM REQUIRES ANTITRUST DUTY TO DEAL AND PREDATORY PRICING

On February 25, 2009, the Supreme Court issued a ruling holding that a plaintiff claiming that it was subjected to a "price-squeeze" in violation of Section 2 of the Sherman Act must allege that the defendant had an obligation to deal with it under antitrust law. *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009). The plaintiffs' "price-squeeze" theory was that the defendant raised its wholesale price and lowered its retail price to "squeeze" the profit margin of its competitors with the ultimate aim of excluding them from the retail market. The Supreme Court dissected the price-squeeze claim into a wholesale duty-to-deal claim and a retail predatory-pricing claim, neither of which was legally sufficient.

Background

linkLine concerns the market for digital subscriber line service, better known as DSL service, a service that allows for internet connection through telephone lines. Defendant Pacific Bell (referred to in the opinion and this memorandum as AT&T) owns and controls infrastructure necessary to provide DSL services in California and sells DSL transmission service both to internet service providers at the wholesale level and directly to customers at the retail level. Notably, the Federal Communications Commission required AT&T, as a condition to approval of an earlier merger, to provide wholesale DSL service to individual firms at a price no greater than its retail price.

The plaintiffs are internet service providers in California that purchase wholesale DSL service from AT&T and compete with AT&T in the retail DSL market. The plaintiffs sued AT&T, alleging a refusal to deal, denial of access to an essential facility, and a "price-squeeze," all in violation of Section 2 of the Sherman Act. The plaintiffs argued that AT&T was required under antitrust law to provide them with a "fair" spread between the wholesale and retail prices. *Id.* at 1114-1115.

The district court denied AT&T's motion to dismiss the complaint, but certified for appeal the question of whether the Supreme Court's recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), "bars price squeeze claims where the parties are compelled to deal under the federal communication laws." *linkLine*, 129 S. Ct. at 1116. The U.S. Court of Appeals for the Ninth Circuit affirmed the denial of AT&T's motion to dismiss, reasoning that price-squeeze claims were recognized in antitrust law prior to *Trinko* and were not foreclosed by that decision or by the telecommunication laws. The Supreme Court granted *certiorari* "to resolve a conflict over whether a plaintiff can bring price-squeeze claims under § 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff." *Id.* at 1116-1117.

Supreme Court Holding

The Court dealt with the "price-squeeze" theory as combining two separate antitrust claims — a refusal to deal at the wholesale level and predatory pricing at the retail level. As to the wholesale level, the Court relied on *Trinko* for the proposition that, "if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." *Id.* at 1119. Since any duty to deal with its competitors would come from FCC regulations, not antitrust law, the Court held that the plaintiffs could not succeed on their Section 2 claims. That was so despite the fact that the plaintiffs alleged inflated wholesale prices rather than sub-par service, as in *Trinko*, since antitrust law regards price and non-price components of commercial activity similarly.

With regard to the retail level, the Court stated that a "price-squeeze" theory was insufficient to state a claim for predatory pricing absent allegations of below-cost pricing and probability of recoupment. Under established precedent, a predatory-pricing claim must allege both below-cost pricing and a "dangerous probability" of recoupment. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993). Such a strict test is critical to prevent "false positives" that would punish companies for aggressively competing by lowering prices, a central feature of a competitive market. Since the plaintiffs did not allege either below-cost pricing or a "dangerous probability" of recoupment, they could not state a predatory-pricing claim at the retail level. *linkLine*, 129 S. Ct. at 1120.

The Court acknowledged (in a footnote) the argument that price-squeeze claims have been a part of antitrust jurisprudence since the seminal *Alcoa* decision in 1945, which found the existence of such a claim "unquestionable." The Court responded: "Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us." *Id.* at 12 n.3. The developments in antitrust jurisprudence to which the Court referred increasingly recognize a lawful monopolist's right to run its affairs, including by charging monopoly prices, without government interference. Indeed, the Court quoted from *Trinko* that the charging of monopoly prices by way of a lawfully obtained monopoly "is an important element of the free-market system." *Id.* at 1122.

In sum, the Court described the "price-squeeze" theory advanced by plaintiffs as "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 1120. Further supporting the Court's decision was that antitrust law, and thereby competition, is better served by bright-line rules than by judicial intervention in setting terms of commercial transactions. *Id.* at 1120-1122.

Conclusion

The *linkLine* decision further curtails the reach of the Sherman Act to unilateral conduct. Among the "rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct," the Court cites only to *Brooke Group* and *Aspen Skiing*, two Supreme Court cases that have not led to an expanded jurisprudence of Section 2 liability. *Id.* at 1118. *linkLine* thus joins *Trinko* and *Brooke Group* in limiting the types of unilateral conduct that will result in antitrust liability for a single firm, including a monopolist.

We note, however, that many of the new administration's antitrust enforcers seem to take a different view of Section 2 liability.[1] Government regulators may increasingly seek to bring unilateral-conduct (Section 2) cases despite recent decisions from the Supreme Court.

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[1] For example, Ms. Christine A. Varney, the nominee for Assistant Attorney General for the Antitrust Division of the Department of Justice, has expressed her view that *Trinko* was "absolutely too extreme," and that the government should "find the right cases to begin to push back on some of the doctrine that may have gotten too extreme in the last decade." (Christine A. Varney, Remarks before the American Antitrust Institute Breakout Session on Re-Energizing Section 2 Enforcement (June 16, 2008) (audio available at http:www.antitrustinstitute.org/Archives/Varney.ashx), at 53:00.)